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ON "RENDITIONS TO TORTURE: THE CASE OF MAHER ARAR,"

HEARING BEFORE THE HOUSE COMMITTEE ON FOREIGN AFFAIRS' SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT AND THE COMMITTEE ON THE JUDICIARY'S SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

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INTRODUCTION

Thank you for inviting me to testify on the legality of extraordinary rendition, the practice by which the United States transfers persons to third countries where they are more likely than not to be subjected to harsh interrogation practices, including torture, in the hope of thereby gaining "actionable intelligence." As one U.S. official involved in the practice infamously described it, "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them."[1] This practice, which facilitates and condones the universally condemned practice of torture, is illegal under both domestic and international law. While the practice has been reported in the press, it has not yet been subject to a credible independent investigation by the United States. If the United States is to begin to recover its standing as a human rights standard-bearer, Congress must make clear that extraordinary renditions are impermissible, and must authorize an independent investigation of the administration's rendition practice.

I am a professor of constitutional law, immigration law, and national security and civil liberties at Georgetown University Law Center. I have written widely on the legal issues raised by the tactics employed in the "war on terror," including three books and several law review articles.[2] I am also a volunteer cooperating attorney for the Center for

[1] Duncan Campbell, *September 11: Six Months On; U.S. Sends Suspect to Face Torture*, Guardian (London), Mar. 12, 2002, at 4 (quoting U.S. official).

[2] *See, e.g., Less Safe, Less Free: Why America Is Losing the War on Terror* (New Press, 2007) (with Jules Lobel); *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New Press, 2005, revised paperback ed.); *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (3d ed. New Press, 2006); "The National Security Agency's Domestic Spying Program: Framing the Debate," 81 Indiana Law Journal 1355 (2006) (with Martin S. Lederman); "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," 101Michigan Law Review 2565 (2003); "The New McCarthyism: Repeating History in the War on Terrorism," 38 Harv. Civil Rights Civil Liberties Law Review 1 (2003).

Constitutional Rights, a legal and educational non-profit organization in New York, and in that capacity I am co-counsel for Maher Arar, whose wrenching story you have heard today. Arar's account demonstrates, more clearly than any legal discussion, why rendition is morally, ethically, and legally wrong.

Arar's story also demonstrates how a democracy should respond when such a wrong has been done. Canada undertook an extensive high-level official investigation of Arar's treatment, and Canada's complicity in it. It issued a lengthy report fully exonerating Mr. Arar and harshly criticizing Canadian authorities. And it paid Arar a substantial damages award for its complicity in the wrongs that the United States and Syria inflicted on him. By contrast, the United States argues that Arar's claims cannot even be heard in court, claiming that its interest in secrecy trumps even the prohibition on torture.

I will address the domestic and international laws that prohibit rendition. It should not be surprising that this practice is illegal under multiple sources of law. Few practices in the world today are as universally condemned as torture. It is prohibited by our Constitution, by federal statutes, by multiple international treaties, and by customary international law. Indeed, the prohibition against torture is considered so fundamental to the world legal order that it is one of the few norms classified as *jus cogens*, meaning that the world considers it absolute, admitting of no exceptions. Other *jus cogens* norms include the prohibitions on slavery, genocide, and extrajudicial executions. To ask whether it is permissible to transfer a person to a third country to be tortured is akin to asking whether it is legally permissible to transfer a person to be sold into slavery, to be summarily executed, or to be a victim of genocide. For all practical purposes, the question answers itself.

As a matter of constitutional law, sending an individual to a third country for purposes of having him subjected to torture "shocks the conscience," and accordingly violates substantive due process, just as torturing the individual directly would violate due process. Where federal officials are complicit in subjecting an individual to torture abroad, they also violate 18 U.S.C. §2340A, and can be held criminally liable. And when officials are complicit in subjecting an individual to torture under color of foreign law, they can be held civilly liable under the Torture Victim Protection Act, 28 U.S.C. § 1350, note. Finally, where, as in Mr. Arar's case, federal officials use immigration powers to remove an individual to a country where he faces a threat of torture, they have violated the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which implements the Convention Against Torture, and prohibits removal to a country where there are substantial grounds for believing the person would be in danger of being subjected to torture.

As a matter of international law, rendition to torture violates the Convention Against Torture, which prohibits signatory nations, including the United States, not only

from directly inflicting torture, but also from sending individuals to other countries where they are more likely than not to be tortured. Rendition to torture also violates the International Covenant on Civil and Political Rights. Finally, rendition to torture violates customary international law, which as noted above, recognizes the bar on torture as a *jus cogens* norm, the most absolute prohibition known to international law.

U.S. officials often point to diplomatic assurances as a "defense" to claims that their extraordinary renditions violate prohibitions on torture. But relying on such assurances, from countries that have already shown themselves willing to violate solemn treaty obligations and *jus cogens* norms, does not resolve the problem. Such countries' promises have already been shown to be unreliable, and the kind of monitoring that would need to be done to ensure that such promises are kept has never been done, and may be virtually impossible.

The fact that extraordinary rendition violates so many legal norms only underscores what should be self-evident. Just as it is patently illegal to torture a human being directly, so it is patently illegal to deliver him to a third country to have it do the dirty work. Outsourcing torture does not make it any less objectionable.

I. Federal Restrictions on Renditions to Torture

A. Due Process

Rendition to torture, like torture itself, violates due process. Had U.S. officials, instead of sending Maher Arar to Syria, simply tortured him in an interrogation room at JFK Airport, they would unquestionably have violated his Fifth Amendment rights. The fact that his rights were violated through joint action taking place in two countries does not render U.S. officials' conduct permissible for two reasons: (1) the constitutional violation arose in the U.S., and (2) the Constitution bars U.S. officials from subjecting individuals to torture outside our borders, particularly when the officials willfully transported Arar overseas to evade constitutional restrictions.

Torture "shocks the conscience" and thereby violates substantive due process rights. Indeed, the case establishing the "shocks the conscience" standard, *Rochin v. California*,[3] found that stomach pumping for drugs in a hospital violated due process precisely because it was "too close to the rack and screw." Any physical coercion -- or even the threat of physical coercion -- violates substantive due process rights.[4]

The fact that victims of rendition tend to be foreign nationals, not U.S. citizens, does not deprive them of substantive due process protection against conscience-shocking

[3] 342 U.S. 165, 172-73 (1952),

[4] . *Colorado v. Connelly*, 479 U.S. 157, 163 (1986) ("certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.") (quoting *Miller v. Fenton*, 474 U.S. 104, 109 (1985)).

treatment.[5] In Maher Arar's case, the constitutional violations arose while he was detained in the United States, so the case for applying constitutional protections is especially strong. But even where foreign nationals are abducted and rendered from countries outside the United States, and do not step foot in the United States, substantive due process may bar U.S. officials from delivering a person in federal custody to foreign officials for the purpose of inflicting torture. While the Supreme Court has sometimes declined to extend constitutional protections to foreign nationals outside our borders, in *Rasul v. Bush*, 542 U.S. 466 (2004), the Court more recently stated that constitutional rights extend at least to some foreign nationals outside U.S. The *Rasul* case principally addressed jurisdictional issues, but the Court squarely stated that:

> Petitioners' allegations -- that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing -- unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3). Cf. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 277-278 (1990) (Kennedy, J., concurring), and cases cited therein.[6]

In *Verdugo-Urquidez*, the decision relied on by the *Rasul* Court, Justice Kennedy, who cast the deciding vote, concluded that fundamental constitutional rights extend to foreign nationals overseas when application of the right would not be "impracticable and anomalous."[7] He found that applying the Fourth Amendment in foreign countries would be impracticable, as there is no authority for federal courts to issue warrants with respect to foreign countries, and expectations of privacy may differ greatly from country to country. By contrast, there is nothing impracticable or anomalous about holding U.S. officials to the due process prohibition on torture when they conspire with others to subject an individual to such treatment. The prohibition on torture is universal (unlike the Fourth Amendment warrant requirement at issue in *Verdugo-Urquidez*). The concern that federal officials must be able to operate abroad in a legal and political framework very different from that of the U.S.—as in *Verdugo-Urquidez*—does not arise with respect to torture, because the prohibition of torture is universal.[8]

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[5] *See Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990) (unadmitted foreign national is protected by substantive due process); *Ngo v. INS*, 192 F.3d 390, 396 (3d Cir. 1999) (excludable alien is "a 'person' for purposes of the Fifth Amendment" who "is thus entitled to substantive due process") (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)); *see also Sierra v. INS*, 258 F.3d 1213, 1218 n.3 (10th Cir. 2001).

[6] 542 U.S. at 484 n.15.

[7] *Verdugo-Urquidez*, 494 U.S. at 277-78.

[8] The Supreme Court may provide further guidance on the question of the scope of constitutional protections enjoyed by foreign nationals outside our borders in *Boumediene v. Bush*, currently pending before the Court, which involves the question of whether Congress constitutionally stripped Guantanamo detainees of habeas corpus in the Military Commissions Act.

B. 18 U.S.C. § 2340A

Rendering an individual to a third country to subject him to torture also violates 18 U.S.C. § 2340A, which makes it a felony to subject an individual to torture outside the United States, or to conspire to do so. The reason Congress limited the criminal statute to torture inflicted *outside* the United States was that torture inflicted within the United States was already a crime under both federal and state assault, battery, and murder laws.[9] Where federal officials send an individual to a country where he faces a risk of torture for the purpose of eliciting information, they have conspired to pursue an unlawful objective – torture abroad – and have committed an overt act in furtherance of the conspiracy – the rendition itself.[10] As the Congressional Research Service concluded, "Clearly, it would violate U.S. criminal law and [Convention Against Torture] obligations for a U.S. official to conspire to commit torture via rendition, regardless of where such renditions would occur."[11]

Where federal officials do not intend to subject an individual to torture, criminal conspiracy liability will not lie. Officials are likely to maintain that by obtaining diplomatic assurances that an individual will not be tortured in the country to which he is transferred, they cannot be held liable for conspiracy to subject the individual to torture. However, the existence of assurances is not a bar to all prosecution; where circumstances demonstrate that the assurances were obtained as a form of cover, and that in fact the purpose of transferring the individual was to subject him to torture in the receiving country, the mere obtaining of diplomatic assurances would not be a barrier to liability. (Diplomatic assurances are discussed in further detail below.)

C. Torture Victim Protection Act

Federal officials who are complicit in subjecting an individual to torture abroad may also be civilly liable under the Torture Victim Protection Act (TVPA). That act states that an "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual[.]"[12] Where federal officials act in concert with foreign officials to subject an individual to torture under color of a foreign nation's law, they violate the TVPA.

The TVPA authorizes claims for "secondary liability" against individuals who aid or abet, or conspire with, primary violators.[13] But are federal officials who deliver an

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[9] *See* S. Rep. No. 103-107, at 59.

[10] David Weissbrodt and Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 Va. J. Int'l L. 585, 618-21 (2006).

[11] Congressional Research Service, Renditions: Constraints Imposed by Laws on Torture (updated April 5, 2006), at 12. The CRS Report goes on to state that it is less clear whether criminal sanctions would apply were a person transferred for harsh treatment not rising to the level of torture. *Id.*

[12] Pub. L. No. 102-256, 106 Stat. 73, 28 U.S.C. § 1350, note, §2(a).

[13] The TVPA extends "to lawsuits against persons who ordered, abetted, or assisted in the torture." S. Rep. No. 249, 1991 WL 258662, at *8.

individual to another country in order to have him tortured acting "under color of law of any foreign nation?" The short answer is yes. Congress directed that the TVPA's "color of law" requirement should be governed by jurisprudence interpreting the same term under 42 U.S.C. § 1983.[14] Under that jurisprudence, a federal official's participation in joint activity with a state actor is sufficient for § 1983 liability to attach. In other words, where federal and state officials act jointly to deprive an individual of his civil rights, the federal official can be held liable for his complicity in denying an individual's civil rights under color of *state* law. By analogy, then, a federal official who participates in a joint enterprise with foreign officials to have an individual subjected to torture under color of *foreign* law is liable under the TVPA.

The district court in Arar's case disagreed with this analysis, concluding that federal officials could be held liable under the TVPA only if they acted at the direction of the Syrian officials; otherwise, it reasoned, the federal officials were acting under federal law, not foreign law.[15] But in a joint enterprise, it is surely possible for federal officials to act under color of *both* jurisdictions' laws, and therefore to be liable for their part in subjecting an individual to torture under color of a foreign country's law. Had private parties abducted Arar and transported him to Syria to be tortured by Syrian authorities, they would unquestionably be liable under the TVPA. There is no reason why abuses by U.S. officials should be exempt from liability under the TVPA when the same abuses by private parties are actionable.

Construing the TVPA, the U.S. Court of Appeals for the Second Circuit found that a "private individual acts under color of law within the meaning of § 1983 when he acts "together with state officials or with significant state aid."[16] Accordingly, where a federal official acts together with foreign officials or with significant aid from the foreign government to subject an individual to torture under color of foreign law, he is liable in damages under the TVPA.

D. Foreign Affairs Reform and Restructuring Act

The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) was enacted to implement Article 3 of the Convention Against Torture. It provides that

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[14] S. Rep. No. 102-249 1991 WL 258662, at *8 (stating that courts should look to § 1983 in construing under color of law "in order to give the fullest coverage possible").

[15] *Arar v.Ashcroft*, 414 F.Supp.2d 250, 287 (E.D.N.Y. 2006) (appeal pending).

[16] *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (citing *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)); *see also Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887, at *13 (S.D.N.Y. Feb. 28, 2002) (finding corporate defendants acted under color of law because of a "substantial degree of cooperative action" with the Nigerian Government). There is "no reason why a joint conspiracy between federal and state officials should not carry the same consequences under § 1983 as does joint action by state officials and private persons." *Kletschka v. Driver*, 411 F.2d 436, 448 (2d Cir. 1969). The § 1983 test is satisfied if "the state or its officials played a 'significant' role in the result." *Id.* at 449.

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.[17]

FARRA also directed executive agencies to adopt regulations to implement Article 3 of the Torture Convention, barring countries from sending individuals to countries where they face a risk of torture. The DHS, the Department of Justice, and the State Department have adopted such regulations. Those regulations absolutely prohibit the removal of all persons to countries where they would more likely than not be tortured.[18] Thus, where federal officials exploit immigration authority to transfer an individual to another country to be tortured, they violate FARRA and its implementing regulations. FARRA, however, creates neither a private right of action for damages nor criminal liability.

II. International Law Restrictions on Renditions to Torture

A. Convention Against Torture

The U.N. Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (CAT), a treaty ratified by the United States in 1994, prohibits all forms of torture, and also prohibits the transfer of persons to countries where there is a substantial likelihood that they will be tortured. Article 3 provides that no state "shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

While Article 3 is explicitly engaged by the decision to remove Maher Arar from the United States to Syria, some have raised questions about whether Article 3 applies where a country transfers an individual from another country to a third country. The Congressional Research Service has opined that the terms "expel, return, or extradite" in Article 3 of CAT may not cover a rendition from another country to a third country. When CIA officials render an individual from Afghanistan to Egypt, for example, the CRS reasons, the transfer may not amount as a formal matter to an expulsion, a return, or an extradition.[19] This interpretation is predicated on a narrow reading of "expel" to mean an expulsion only from the acting state's own borders.

However, expulsion could also be read more broadly, to include any forcible transfer of an individual out of the country in which he is residing, regardless of which state is involved in the transfer. Given the absolute nature of the ban on torture, and the

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[17] FARRA, § 2242(a), in Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 1-5-277 (1998).
[18] 8 C.F.R. §§ 208.16-18, 1208.16-18; 8 C.F.R. § 235.8(b)(4).
[19] CRS, *Renditions*, *supra*, at 13-14.

sweeping ban on all forms of otherwise legal transfers to countries where there is a substantial likelihood of torture, such a reading of expulsion is more consistent with the purpose of the Convention. Indeed, it is inconceivable that the framers of the Convention meant to carve out a loophole affirmatively permitting informal transfers to torture while prohibiting all formal transfers; it is far more likely that they intended their language to be all-encompassing. Thus, to interpret the CAT prohibition not to apply to informal transfers would violate the intent of the treaty. The United States appears to have accepted the broader understanding of the Convention. In FARRA, it stated that it is against United States policy to "expel, extradite, or otherwise effect the involuntary return" of a person to a country where he faces a danger of torture, "regardless of whether the person is physically present in the United States."

This broader understanding of the Torture Convention language is also supported by the fact that the drafters added the reference to "extradition" to the original draft of Article 3 to ensure that it would "cover all manners by which a person is physically transferred to another state."[20]

Finally, this broader interpretation is buttressed by the fact that even where human rights treaties do not expressly bar transfers to torture, but merely bar torture itself, they have been interpreted to prohibit all transfers to countries where individuals face a risk of torture. Thus, the European Convention on Human Rights prohibits torture, but contains no language barring the removal or transfer of individuals to other countries where they might be tortured. Nonetheless, the European Court of Human Rights has ruled that the Convention's prohibition on torture implies a prohibition on any kind of transfer or forcible removal of an individual to a country where there are substantial grounds to believe that he will be tortured.[21] If a human rights treaty that prohibits torture but is silent on forcible transfers nonetheless prohibits all forcible transfers to countries posing a risk of torture, surely a Convention that expressly prohibits both torture and forcible transfers should be interpreted just as broadly.

B. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, prohibits torture and cruel, inhuman, and degrading treatment. Like the European Convention on Human Rights, it does not expressly prohibit forcible transfers, but the Human Rights Committee charged with interpreting the ICCPR has interpreted its prohibition on torture and cruel, inhuman, and degrading treatment to include an obligation on states not to "expose individuals to the danger of

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[20] J. Herman Burgers and Hsns Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or* Punishment(1988), at 126. Burgers and Danelius were two of the original drafters of the Torture Convention, and their treatise is the definitive work on the subject.

[21] *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) (1989); *Vilvarajah and Others v. Uniked Kindgom*, 215 Eur. Ct. H.R. (ser. A) (1991); *see* Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions,"* (2004), at pp. 41-42.

torture or cruel, inhuman, or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or *refoulement*."[22] Thus, transferring an individual to a country where he faces a risk that he will be tortured violates the ICCPR. The ICCPR is not self-executing, and therefore does not give rise to a private cause of action, but it is nonetheless binding on the United States as a matter of international law.[23]

III. Diplomatic Assurances

Government officials have asserted that the United States obtained assurances from Syria that it would not torture Mr. Arar, and that this demonstrates that his removal was not for the purpose of having him tortured. Other officials have claimed that such assurances have generally been obtained where there was a concern about the possibility of torture. Diplomatic assurances from countries with a demonstrated record of torture are insufficient to reduce the risk of torture, for two reasons – we have no reason to trust a country that repeatedly tortures, and second, we have no effective way of monitoring such assurances.

First, diplomatic assurances are obtained only where absent such assurances, there is a likelihood of torture. If there is no risk of torture, there would be no need for diplomatic assurances. The United States has thus never sought diplomatic assurances from Canada or the United Kingdom, for example. It seeks assurances only from countries where there is reason to believe that torture is practiced sufficiently frequently to bar transfer absent the assurances.

If the countries we seek assurances from routinely engage in torture in direct violation of their own explicit treaty promises, what justification is there for believing that they will honor a much less formal bilateral side agreement? In *Filartiga v. Pena-Irala*,[24] the brief filed by the United States explained that countries that engage in torture never admit that they do so.[25] Therefore, a country that routinely and repeatedly engages in torture will also routinely and repeatedly lie about that fact. If officials lie about the fact that they engage in torture when confronted about it, why is there any reason to believe they will not lie about the diplomatic assurances they give?

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[22] Human Rights Committee, General Comment 20, *Article 7*, UN Doc. A/47/40 (1992); *see also* Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPOR/C/21/Rev.1/Add.13 (2004), at para. 12 (finding in Article 2 an obligation "not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by article[] … 7").

[23] The Geneva Conventions also prohibit renditions to torture in military conflicts or occupations, but that is beyond the scope of this testimony.

[24] 630 F.2d 876 (2d Cir. 1980).

[25] Memorandum for the United States, *Filartiga v. Pena-Irala*, 630 F.2d 876. (2d Cir. 1980), reprinted in 19 I.L.M. 585 (1980).

There are particular reasons not to trust diplomatic assurances from Syria. We generally don't believe anything that the Syrian government tells us, whether about its interference in Lebanon, its attempt to develop nuclear weapons, or its role in Iraq. Indeed, it seems that about the *only* matter on which the United States has purported to trust Syria in years was its reported assurance not to torture Mr. Arar. Of course, had U.S. officials truly wanted to avoid the prospect of Mr. Arar being tortured, they had a much simpler and infinitely more reliable route – to deport him to Canada, where he had resided as a citizen for nearly two decades, and which, unlike Syria, has no record of torturing its suspects.

Second, for assurances to be truly reliable, particularly where the receiving state has a record of torture, substantial monitoring would be necessary. Absent extremely intrusive and costly monitoring, it is highly unlikely that any state can be held to its promises – particularly as states that engage in torture routinely lie about whether they do so. Torture is particularly challenging to monitor. Behind closed doors, it is difficult to know what happens in an interrogation room or prison cell. And states have learned to inflict torture in ways that do not leave physical marks. As far as we know, the United States made absolutely no attempt to monitor Mr. Arar's treatment by the Syrians, or indeed to monitor the treatment of any person whom it rendered.

The Commissioner for Human Rights for the Council of Europe, Alvaro Gil-Robles, has made precisely such arguments, stating that:

> The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibition on torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nevertheless remains ... When assessing the reliability of diplomatic assurances, an essential criteria must be that the receiving state does not practice or condone torture or ill-treatment, and that it exercises effective control over the acts of non-state agents. In all other circumstances it is highly questionable whether assurances can be regarded as providing indisputable safeguards against torture and ill-treatment.[26]

Mr. Gil-Robles' comments were inspired by the Swedish government's expulsion of two Egyptian asylum-seekers in December 2001 on the strength of diplomatic assurances obtained from the Egyptian authorities. Once in Egypt, the men were detained incommunicado and reportedly tortured.[27] In reviewing this case, the

[26] Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, April 21-23, 2004, Council of Europe, CommDH (2004)13, 8.7.04.

[27] *Agiza v. Sweden* Communication No. 233/2003; *see generally* Human Rights Watch: "Empty Promises: Diplomatic Assurances No Safeguard Against Torture" April 2004; and "Still at Risk: Diplomatic

Committee Against Torture rejected the use of diplomatic assurances to guard against such a strong risk of torture, and noted that because of the assurances, the Swedish official in Egypt responsible for monitoring the treatment of the two Egyptians concealed evidence that they had been tortured.[28] For these reasons, the Special Rapporteur of the U.N. Commission on Human Rights has said that "post-return monitoring mechanisms do little to mitigate the risk of torture and have been proven ineffective in both safeguarding against torture and as a mechanism of accountability."[29]

In short, because diplomatic assurances rely on trust in circumstances that provide no reason for trust, and because absent 24/7 monitoring the promises cannot be enforced, diplomatic assurances should be looked on with great skepticism. Where, as in Mr. Arar's case, there was a much simpler avenue available were officials truly interested in avoiding the risk of torture, they appear to be little more than window-dressing.

CONCLUSION

Rendition to torture is wrong as a moral matter, illegal as an international and federal legal matter, and likely counterproductive as a security matter. Our pursuit of this tactic has occasioned widespread criticism of the United States around the world, playing into our enemies' hands by giving them ideal recruitment propaganda. It should be plain to see that just as torture itself is wrong and illegal under all circumstances, so is transferring a human being to another country to have it engage in the very same wrong and illegal behavior. Congress should immediately authorize a full-scale independent investigation of the administration's extraordinary rendition policy.

Assurances No Safeguard Against Torture" April 2005; Report of the Special Rapporteur on Torture, Theo van Boven, to the General Assemble, 23.8.04, paragraph 37.

[28] Committee Against Torture, Communication No. 233/2003. May 20, 2005, U.N. Doc. CAT/C/34/D/233/2003, at ¶¶ 4.24, 8.1, 12.15, 13.4, 13.10

[29] The Secretary-General, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, ¶46, submitted to the General Assembly, U.N. Doc. A/60/316 (Aug. 30, 2005); *see generally* Weissbrodt and Bergquist, *supra*, at 621-24.